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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF CLEVELAND ET AL., APPELLEES.

BRIEF IN REPLY FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES.

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No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY, APPELLEES.

REPLY BRIEF FOR APPELLANT.

The arguments of counsel for appellees, as well as the opinion of the court below, from which liberal quotation is made, by necessary implication, admit that if the Garden Street tracks in controversy are extensions of the main line of the East Cleveland Railroad Company, then the decree below was wrong. This being the admission of counsel, the burden of the argument is upon them to show that the Garden Street line was not an extension of the main line, but was an independent line of railroad, unconnected in any legal sense with the main line of the East Cleveland Railroad Company. Replying to this argument, we beg in the first place to add to that which we have already submitted in our original brief.

The Garden Street tracks in controversy are in substantially all ordinances referred to as a "branch." This lan-

guage ex vi termini imports that such tracks are an extension of a main line.

There is no such thing as a "branch" street railroad in terms known to the statutes of Ohio. When the council legislate as to a "branch," if branch means anything other than extension, such legislation is without statutory sanction.

Ordinances Referring to Garden Street Tracks as a Branch.

Among other ordinances and resolutions referring to the Garden Street tracks in controversy as a branch, we call attention to the following:

Resolution of 1873 (Record, 199), reciting:

"Whereas, The East Cleveland Railroad Company desires and proposes to connect their Garden Street branch with the main line * * *";

In 1876 (Record, 202):

"An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its road."

In 1880 (Record, 208):

"An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its railway."

1885 (Record, 211):

"An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its railway."

1887 (Record, 217):

"An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its railway."

1890 (Record, 225):

"An ordinance granting to The East Cleveland Railroad Company the right to substitute electric motive power for horse power upon its Garden Street branch."

It thus appears that the council in describing the Garden Street tracks in controversy have consistently referred to them as a branch of the railroad of The East Cleveland Company. This, we submit, is equivalent to describing the tracks according to their statutory status as extensions of the main line. As we have before suggested, there is no such thing known to the statutes of Ohio as a branch of a street railway. In its primary sense the word "branch" means: "A division or subdivision of the stem or arms of a tree or shrub." Hence the word is used as well to describe "something resembling a branch in its relation to the trunk, an offshoot or part extending from the main body of the thing; a ramification, a subdivision, an outgrowth."

To describe the Garden Street tracks as a branch, therefore, necessarily implies a trunk or a main thing of which such branch is an outgrowth—that is, an extension. If council had been searching for an accurate description of an extension track to be expressed in a word synonymous in meaning with "extension," no language could have been found which more precisely describes the thing than is found in the word "branch." If council should authorize a railroad company to build a branch from its main line, clearly such action would be authorized by section 2505 of the statutes, and such branch would necessarily be an extension within the authority of that section.

The City of Cleveland claims the right to disrupt this system of railroads because of some fanciful distinction between a branch of a main line and an extension of a main line. It cannot be that the contract and property rights of the appellant are to be impaired on so flimsy a contention.

No Power in East Cleveland Company to Build Independent Line.

Furthermore, in support of our contention as made in our original brief that the city council and the East Cleveland Railroad Company had no power in 1868 to grant or receive a

grant for or to construct and operate the Garden Street tracks as an independent line, because the company had theretofore adopted and constructed a line between the termini named in its articles of incorporation of 1859, and so had exhausted its power to construct any more tracks under those articles, we call attention to the settled law of Ohio that when a railroad company establishes and constructs a line it thereby exhausts its power in that behalf and cannot even change the location of the line, without special legislative authority to do so.

Little Miami R. R. Co. *vs.* Naylor, 2 Ohio St., 235; Moorehead *vs.* Little Miami R. R. Co., 17 Ohio Rep., 340; Atkinson *vs.* M. & C. R. R. Co., 15 Ohio St., 21.

See also

Toledo & Wabash R. R. Co. *vs.* Daniels, 16 Ohio St., 390, at pp. 395, 396.

There is no difference in principle between changing a line of railway once established between the termini specified in a charter, and accepting a grant for and constructing a line of railway additional to and different from the line so first established. It is to be observed, also, that the Supreme Court of Ohio did not sanction the right of a city to grant or of a company to accept a right to extend the tracks of a street railroad beyond the termini specified in its articles of incorporation, until express power was vested in municipalities to authorize such extensions to be made.

Simms *vs.* Brooklyn Street Railroad Company, 37th Ohio State, cited in our original brief.

This we maintain is in accord with the principles laid down in the other decisions just cited.

Even Treating This So-called Branch as an Independent Line Does Not Aid Appellees.

While we think the considerations already urged demonstrate the Garden Street tracks in controversy to be an extension of the main line of The East Cleveland Company, still we maintain that the evidence adduced here operates to extend the grants covering the Garden Street tracks and connected with them to July 1, 1914, no matter whether those tracks be regarded in law as extensions of the company's main line or as a distinct and independent line of the company.

The contention of counsel for appellee in this behalf amounts to a denial of the *power of the city council* to extend the term of operation of these Garden Street tracks, as confessedly council attempted to do in the ordinances of February, 1885, and of March and April, 1891. It thus becomes necessary to recall what the power of council is as to dealing with the subject-matter of the construction and extension of street railroads and renewals of grants for operation. These powers we have already fully pointed out in the original brief by citing and quoting the statutes of Ohio conferring the power, and as well have called attention to the language of this court construing these statutes (B., 23-26).

We beg to in substance quote from our original brief: The power of the council is comprehensive and continuing to at all times deal with and legislate as to the construction, operation, and extension of railroads and renewal of grants. These powers are just as effective in respect to independent lines as to extensions of lines.

With respect to extensions, special provision is made in the statute. Section 2505 in substance provides:

"The council of any city or village may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad to extend their tracks * * * in any street or streets where council may deem such extension beneficial to the public,

and when such extension is made the charge for carrying passengers on any street railroad so extended * * * shall not be increased by reason of such extension * * *."

By force of this statute and the general delegation of power made by sections 3443, 2501, and 2502, the whole subject-matter of the terms and conditions upon which street railroads may be constructed, operated, and extended and their franchises renewed is committed by general legislation to the city council.

The various grants under discussion must be construed with reference to the fact that the whole subject-matter is within the discretion of the council.

The issue between counsel is whether the ordinance of March 22, 1880, under which the Garden Street branch was renewed for a period of twenty-five years, irrevocably committed council and the company to the date of expiration so fixed, to wit, March 22, 1905. Counsel for appellees, following the argument of the court below, practically contend that the date could not be changed, because the council, in providing for subsequent extensions of the line, was without power to make a change in expiration of grant. We insist that such an argument is only a partial consideration of the evidence contained in this record and places an entirely unauthorized limitation on the power of council.

The court below persisted, as counsel for appellees still persist, in denying to the city council the power to provide for the extension of existing street railroad tracks and at the same time to provide for the continued operation of the tracks as extended beyond the period originally fixed for the grant of the line extended. If this persistence is unsound, the whole claim, both of court and counsel, must fall to the ground. At the risk of in substance repeating what we have urged in our original brief, we beg again to call the court's attention to the fact that this argument of the District Judge and of opposing counsel totally ignores the existence of any power in city councils, except

only the mere power to permit tracks to be physically extended. They would not below and counsel will not here consider the other powers above pointed out. We allude to the renewal power and also to the power to fix the terms and conditions upon which street railways may be constructed, operated, extended, and consolidated.

It cannot be that council, in providing for a physical extension of tracks, thereby precludes itself from providing at the same time for the future operation of the tracks so to be extended; nor can it be that in providing the terms and conditions upon which the railway so extended shall be operated, it is precluded from ordaining the duration of time for such operation; and yet this is precisely what was held in the court below and is insisted upon by counsel here. It is said that because in 1880 it was provided that the Garden Street branch might be operated until 1905, it was not thereafter competent, in 1885 and in 1891, for the council to provide another date for the expiration of such right of operation. This is to deny to the council the power which is expressly conferred upon it by statute and a power which is continuing and, in the language of the statute, to be exercised by council whenever found by it to be conducive to the public interests.

In 1885 (Rec., 211) the council provided for an extension of the Garden Street line and in express terms provided that it should be operated in connection with the main line, and that the grants should "terminate with the grant of the main line." On March 20, 1891, the council provided for a further extension of the Garden Street line, and in terms provided that the line as so extended might be operated "until the expiration of the grants for said company's main line" (Rec., 227).

On April 20, 1891 (Rec., 228), the council provided for additional tracks upon this line of railway, and in terms provided that "the right herein granted shall be valid until the expiration of the grants for said company's tracks on

said Quincy Street east of Lincoln avenue, to wit, July 13, 1913."

Council in these ordinances did in fact provide for the operation of this line as extended until the dates fixed in the ordinances to which we have just referred. Where, we ask, is found any want of power in the council to do that which was here in fact attempted to be done? As we have pointed out in the original brief, to deny the operative force of these ordinances to accomplish that which the council ordained, upon the theory expressed by the court below, is to declare invalid a legislative act for want of power when in fact the act is authorized by the express provisions of the statutes.

Indeed, the holding of the court below and the contention of our adversaries are directly opposed to the holding of this court in the case of Cleveland *vs.* The Cleveland Electric Ry. Co. (201 U. S., 529). As pointed out in our original brief, this court there in substance and effect held that the exercise of the power in the city council to authorize the physical extension of tracks could be accompanied by the exercise also of the power to prolong the term of grant and operation of the line so to be extended. Moreover, the holding of the court below and the contention of counsel are in the teeth of the decision of the Supreme Court of Ohio in Hadden *ex rel. vs.* East Cleveland Railroad Company, where that court affirmed the circuit court sitting at Cleveland (6th Ohio Circuit Court, 318). This is the more remarkable because the ordinance there involved was the ordinance aforesaid of March 22, 1880; for it will be remembered that that ordinance was entitled an ordinance to extend tracks, and yet in its body it not only provided for such extension, but it also prolonged the duration of the grant of the line extended for a period of twenty-five years. This court approved the holding of the Supreme Court of Ohio, in the case last mentioned, in both of the Cleveland Street Railway cases which have been recently determined here. Besides, this court held

in the last one of those cases that it was competent for the city council to exercise in one and the same ordinance (1) the power to change the motive power from animal to electric, and (2) the power of renewal, so as to make a shorter grant coincident with the expiration of a longer grant.

It is worthy of mention that the Supreme Court of Ohio has recently again affirmed the doctrine announced in Hayden *ex rel. vs.* The Cleveland City Railway, *supra,* and so has again affirmed the right of city councils to exercise two or more of its powers, including the powers in question, when legislating on the subject of street railway track extension. We refer to the case of *Belle vs. Glenville* (17 Circuit Court Decisions; S. C., 27 Circuit Court Reports, 181), affirmed by the Supreme Court (73d Ohio State, 392, 397).

Further illustrating the errors of the court below, we find in the opinion (Record, 83 and 84) this statement:

"If an extension may have any other life than the life of the thing to which it forms an extension, it may be given an unlimited term of life by the council."

And much of the opinion is devoted to supporting this proposition.

When it is remembered that the power delegated to council to fix the terms and conditions upon which railroads may be constructed, extended, operated, and consolidated, and to "renew grants at expiration," is subject to the express limitation made upon this power in the provision that no grant or renewal of any grant "shall be valid for a greater period than twenty-five years from the date of such grant or renewal," we must conclude that the learned court below overlooked these statutory limitations. The limitation with respect to twenty-five years in terms as well applies to a grant relating to an extension of existing tracks as to a grant pertaining to the construction of an original line.

Errors of Fact.

Besides the errors of law into which the court below fell, as just pointed out, it also committed an error of fact of controlling importance in its opinion. We had offered the ordinance of April 20, 1891, in evidence (Record, p. 228) in support of our contention that the council had prolonged and extended the grant of the Garden Street branch to July 13, 1913. It was not disputed then, nor is it disputed now, that the council did so in express language; but the court below fell into an error in supposing that the council was mistaken respecting the passage of another ordinance and so held that the ordinance of 1891 aforesaid was inoperative. At page 81 of the record the court said on this subject:

"Respecting the ordinance of April 20th, 1891, granting to the East Cleveland Railway Company permission to lay an additional or second track in Quincy street and from New street to Woodland Hills avenue, and wherein it is provided that the right therein granted shall be 'valid until the expiration of the grant for said company's tracks in Quincy street east of Lincoln avenue, to wit, July 13th, 1913,' the conclusive answer is that the grant for the company's tracks in Quincy street east of Lincoln avenue did not and would not expire July 13th, 1913. The ordinance did not state the fact. It is true that the original right in Quincy street east of Lincoln avenue was, by the terms of the ordinance, granted to expire with the main line franchise. If by 'main line' was meant the Euclid avenue line, then it would expire in 1904. Subsequently that main line franchise was extended to July 13th, 1913, and doubtless the person who drafted this ordinance assumed that, as the main line franchise had been extended to July, 1913, the effect of that extension was to extend the time of the rights in Quincy street east of Lincoln avenue to that date. But the fatal defect in that process of reasoning, and the fatal objection to the date inserted in the ordinance of April 20, 1891, is that after the passage of the ordinance for the Quincy street extension east of Lincoln avenue, and before the passage of the ordinance extending the main line to 1913, to wit, on March

10, 1890, the council passed an ordinance authorizing the East Cleveland Railroad Company to substitute electrical motive power for horse power over its Garden street line to Woodland Hills avenue, and provided that the right to operate the Garden street branch should continue during the term of the company's then present grant for the operation of the tracks upon the Garden street branch."

The mistake of the court here was in its assumption that after the passage of the ordinance for the Quincy Street extension east of Lincoln avenue and before the passage of the ordinance extending the grant of the *main line to 1913,* the council had passed an ordinance authorizing "the change of motive power on the Garden Street branch." The truth was that the council had *before,* to wit, July 13, 1888, authorized the change of motive power to be made and had extended the term of the grant on the main line *to July 13, 1913 (Record, 219).* The council did not authorize such change in motive power to be made on the *Garden Street branch until March 10, 1890* (Record, 225). This error alone is plainly sufficient to destroy the force of the argument stated in the above quotation from the opinion of the court below.

But there is even more convincing evidence of its error. In 1885 the council had authorized the extension to be made east of Lincoln avenue, and had provided that such extension should be operated *"in connection with said branch and its main line and terminating with the grant for the main line, and with the express condition that no increase of fare shall be charged by said company on any part of its main line or on said extension, by reason of such extension"* (Record, 211). Nothing more certainly than this could show an intent on the part of the council to make the expiration of grant on the Garden Street branch coincident with that of the main line. When, therefore, the council, on July 13, 1888, extended the grant for the main line for a period of twenty-five years, to wit, until July 13, 1913, it

intended that this branch of the main line should be operated for this extended period of time. The relevance and weight, then, of the ordinance of April 20, 1891, before alluded to, become apparent and controlling; for, as seen, that ordinance provided that the grant should be "valid until the expiration of the grant for said company's tracks in Quincy street east of Lincoln avenue, *to wit, July 13th, 1913.*" If the court below had observed that the extension in time of the main line had so been made prior to the change allowed of motive power on the Garden Street branch, it is clear that it could not have employed the argument or reached the conclusion it did respecting the intention of council when it adopted the ordinance of *April 20, 1891.* If anything additional to this could be needed to portray and confirm the intention of the city council, it could be found in the ordinance which it adopted just a few weeks before, *to wit, on March 30, 1891* (*Record, 227*). It was there ordained that the grant there made as to the operation of the Garden Street branch should continue *"until the expiration of the grants for the said company's main line."*

It is said by the city solicitor (B., 59) that the reference to "main line" made in this last ordinance meant the Garden Street main line. This is as clearly a mistake on his part as the one was that we have just pointed out in the opinion of the court below concerning the ordinance of April 20, 1891. The city solicitor calls attention to the fact that in an ordinance passed June 18, 1887 (Record, 217), reference is made to a "Garden Street main line." The language there used was in reference to operating an extension of the Garden Street branch then authorized "in connection with said branch and its main line, and terminating with the grant for the Garden Street main line."

This is the only ordinance in which the phrase "Garden Street main line" can be found. It is to be observed that it is used in contradistinction to the company's "main line," as those words in all other instances as well as here have been

employed. It is to be remembered, also, that about two years previously, to wit, by the ordinance of February 9, 1885, the council had provided that the grants for the main line and the Garden Street branch should expire at the same time. It was a matter of indifference, therefore, as to which grant reference was made, whether the grant of the main line or of the Garden Street branch, when fixing duration. Indeed, the phrases "main line" and "Garden Street main line," having both been used in the ordinance of 1887, it is not open to either inference or argument that the reference to "main line" as used in the ordinance of March 30, 1891, could have meant anything else than the company's *"main line."* The council must be construed to have meant what it said—"main line." Counsel for the appellee railway company has made the same claim and error (B., 82, 83).

We submit that the evidential force of these ordinances cannot be avoided by any such errors as the court and counsel have made in respect to them.

Strict Construction of Public Grants.

Both the city solicitor and counsel for the appellee railway company devote pages in their respective briefs to a discussion of the rules of interpretation which should be followed in construing statutes or ordinances relating to grants in derogation of public rights or conferring special privileges. We entirely fail to see the pertinency of such discussion in the case at bar. Appellant has no reason to challenge the principle of construction contended for by counsel, as the claims which we are making in no way involve an application of the rules they invoke. Our contention is that by the plain language of the ordinances, taken as a whole, it appears that the council, having full power so to do, granted by contract the right to continue the operation of the tracks involved until July 1, 1914.

In principle the case at bar, as we have before suggested, is ruled by the two prior decisions of this court (Cleveland

City Ry. Co. *vs.* Cleveland, 194 U. S., and Cleveland *vs.* Cleveland Electric Ry. Co., 201 U. S.). We have followed in our discussion no rule of interpretation which is not fully authorized by this court in the cases just cited.

Ordinances Stipulated into the Record.

Since the printing of our original brief, by stipulation various ordinances have become part of the record, and we find in the brief filed by counsel for appellees references to some of such ordinances. It is said that these ordinances, for the most part, having been passed subsequent to 1894, are "illustrative" of the contention of appellees that the council did not intend, in the Wilson Avenue cross-town ordinance of 1894, to extend the franchises of the two companies whose lines cross or come to Wilson avenue. We think it sufficient to say in reply to this suggestion, that if the legal effect of the contract evidenced in the cross-town ordinance of 1894 is as we contend, it will not be pretended that by the acceptance of the subsequent ordinances to which counsel refers any of the rights granted to the company in 1894 have been modified or impaired. In so far as these subsequent ordinances referred to by appellees may be said to throw any light upon matters here in controversy, it must be with reference to the policy of council to make extension expire with the grants for the main line, and it will be found upon an examination of these subsequent ordinances that in each of them the expiration of the extension is made coincident with the main line. In this respect these ordinances but tend to corroborate the contention which we have been making, that it was the intention of the council, with respect to grants for the Garden Street tracks as well as to all other extensions, to make their period of duration the same as that of the main line.

Short-time Grant Since 1901.

The appellees have introduced among other ordinances a number of grants largely referring to tracks covering short distances in the business part of the city which have in terms been made to expire March 22, 1905. We do not know just what is claimed by counsel for these grants and the company's acceptance of the same, but think it appropriate to refer to the fact that each of them was made pending the existing controversy between the City of Cleveland and the railroad company as to the duration of its rights in the streets. That this controversy has been pending at least since 1900 appears from the records of this court in the cases to which we have so often referred. Pending such controversy, the company could not do anything else than to accept the grants and furnish the accommodations which those short extensions would supply. Surely such conduct is not important in the solution of the main question presented in this record. No one of these short-term grants authorizes the construction of tracks exceeding a distance of 600 feet.

Resolution of 1893 Declaring Policy of Council to Have All Franchises Expire July 1, 1914.

Among the new matter introduced by appellees, we find (page 13) a resolution adopted by the city council March 27, 1893, in the following language:

"That in the opinion of this council all franchises granted by this council for the use of streets for street-car lines should terminate July 1, 1914, instead of twenty-five years hence;"

and following this resolution, upon the same page, is a certificate from the city clerk of Cleveland that at the time of the passage of this resolution there was pending *"the appli-*

cation of the Cleveland Electric Railway Company for a grant for twenty-five years for a cross-town line in Wilson avenue."

It here appears that the council had before it the question as to what its policy ought to be with reference to the termination of street railroad grants thereafter made, and by the terms of its resolution it fixed such date for a common termination to be July 1, 1914. There was pending at the time an application of the Cleveland Electric Railway Company with reference to the Wilson Avenue cross-town line, and we find that the termination of the grant upon Wilson avenue was, together with the new obligations which that ordinance imposed upon the company, made to expire in accordance with the policy of the council declared in this resolution of July 1, 1914, and, as we shall show from other ordinances passed subsequent to the adoption of this resolution, the policy of the council in this respect was followed. Before doing so, however we wish to say that the other ordinances offered by the appellees under this stipulation, showing grants to have been made with expiration periods differing from the one just stated, do not militate against this declared policy, because they but represent individual instances of the exercise of the power to extend the tracks made under grants expiring at different dates, and they can all be harmonized with our contention that all of those grants were extended by the force and operation of the cross-town grant, as claimed in our original brief.

Additional Ordinances Which Sustain the Contention of Appellant that the Grant for the Main Line and the Garden Street Extension Does Not Expire Prior to July 1, 1914.

We have, under the stipulation referred to, introduced into the record four additional ordinances to which we wish to call special attention.

(*a*) October 21, 1889, an ordinance was passed and accepted entitled *"An ordinance granting permission to the Broadway & Newburgh Street Railway Company to extend its line of double track street railroad on and along Miles avenue from Broadway to the easterly limits of the city."* This is an extension of the main line of the Broadway and Newburgh street railroad; and by section 5 of the ordinance it is provided:

"This grant shall expire with the grant to said company for its main line and extensions as made July 1, 1889, to wit, July 1, 1914." * * *

(*b*) July 21, 1890, an ordinance was passed and accepted entitled *"An ordinance to grant to the Broadway & Newburgh Street Railroad Company the right to extend and operate its line of double track street railroad in Broadway at Liberal street; thence in and along Pittsburg street and Kingsbury Run Viaduct extension so called, to a connection with said company's tracks now in Humboldt street."* The line here provided for is an extension of the main line of the Broadway and Newburgh Street Railroad Company, and, as to its expiration, it is provided:

"SEC. 6. *This grant shall expire with the grant of said company for its main line and extensions as made July 1, 1889, to wit, July 1, 1914."* * * *

Here it is to be observed that the council pursue what we claim to have been a uniform policy, to make extension grants expire with the grant of the main line.

Extension of Main Line of East Cleveland Railroad Company Subsequent to July, 1894, Recognizing That Grant for Main Line, Does Not Expire Prior to July 1, 1914.

We now call attention to two ordinances which, we submit, clearly sustain our contention not only as to the uniform policy of council to make the grants for all extensions of the East Cleveland Company's main line expire with the grant for such main line, but as well our contention that the legal effect of the cross-town ordinance of 1894 was to extend the life of the main line grant of the East Cleveland Company and its extensions to July 1, 1914.

1. October 21, 1895, an ordinance was passed and accepted entitled "*An ordinance granting permission to the Cleveland Electric Railway Company, its successors and assigns, to extend its double-track street railroad from the junction of Carabelli street and Euclid avenue easterly to the easterly limits of the city of Cleveland.*" The extension here authorized is an extension of the "main line" of the East Cleveland Railroad Company, and in section 3 it is provided:

"This grant shall expire July 1, 1914."

Here it will be observed that the year next following the establishment of the cross-town line upon Wilson avenue, and in harmony with the declared policy of the city in the resolution of 1893, an extension of the main line upon Euclid avenue is authorized, and it is expressly provided that the grant shall expire July 1, 1914—that is, at the same time with the Wilson Avenue cross-town ordinance passed the year

previous. This is the first extension of the main line subsequent to the establishment of the cross-town line upon Wilson avenue, and by its terms the council recognize that by virtue of the cross-town ordinance the grant of the *"main line"* has been renewed to July 1, 1914, and therefore provides in this extension ordinance that the main line may be extended and the grant expire July 1, 1914.

2. September 28, 1896, council passed an ordinance entitled *"An ordinance granting permission to the Cleveland Electric Railway Company, its successors or assigns, to extend its street railroad across Deering, Stearns and Fairfield streets, with suitable curves or connecting tracks in Euclid avenue and Cedar avenue."* This ordinance was duly accepted and the line constructed, and it is an extension of the main line upon Euclid avenue. By section 4 of the ordinance it is provided:

"Said extension shall be operated as a part of the Euclid Avenue main line of said company; and said company shall operate on said extension through cars to and from the Public square under a ten-minute schedule or headway between the hours of six a. m. and eight p. m., and under a fifteen-minute schedule or headway between the hours of eight p. m. and eleven p. m."

The extension here provided for is an extension of the *"main line"* of the company. It is to be operated as part of such main line under a schedule fixed by council. By section 13 it is provided:

"This grant shall expire July 1, 1914."

This, then, is an ordinance relating to an extension of the *"main line"* of the East Cleveland Company, providing that such extension shall be operated as part of the main line and providing that the grant shall expire July 1, 1914. Is it not manifest that council here recognizes the legal effect of the Wilson Avenue cross-town ordinance? As we have

before shown, such legal effect was to extend the main line up Euclid avenue to July 1, 1914. In this ordinance this fact is recognized.

The Garden Street tracks in controversy are operated under grants made to expire with the *"main line."* The "main line" here referred to is the same which we have just shown has been renewed until July 1, 1914. Hence we submit that the grant upon Garden street can not be held to expire prior to July 1, 1914, and that in the ordinance to which we have just called attention is found conclusive evidence of intent on the part of the City of Cleveland and the railroad company to make all grants of the Cleveland Electric Railway Company in existence in 1894 expire with the grant of the cross-town line upon Wilson avenue, to-wit, July 1, 1914.

Appellees' Contention as to Wilson Avenue Cross-town Ordinance.

The contention we make as to the legal effect of the contract of 1894, made between the city and the two railway companies then operating, is by the city solicitor met by two suggestions:

First, attention is called to section 12 of this ordinance, which provides in substance that in case of the failure or refusal of either of the companies to perform the terms and conditions of the ordinance, such failure shall work a forfeiture of the grant;

And, second, that the obligation to transfer to and from Wilson avenue did not add to the then existing obligations of the company.

As to the first of these criticisms, it is sufficient to say that the obligation of the company to comply with the terms of the ordinance is a contract obligation which may be specifically enforced by mandatory injunction, and not only is this true in Ohio, but it is as well true that the statutes make it the duty of the city solicitor to enforce such contracts.

It is surprising, then, to find a suggestion from the city solicitor inviting a street railroad company to violate its contract, when by statutory provisions it is made his official duty to compel the performance of such contract. Moreover, it comes with ill grace from the officials of Cleveland to suggest, as a defense to its grantees' contractual right and obligation, that it may surrender its right by repudiation of its obligation.

As to the *second* criticism by the city solicitor, that the obligations assumed did not increase existing obligations as to transfer, it is sufficient to point out that the learned solicitor overlooks the fact that this was a contract made between the city and two independent railway companies, providing for a general system of transfer, making, as respects the Wilson Avenue Cross-town line, one system, with general transfers to and from the lines of independent companies. Before the passage of this ordinance there was no such obligation of transfers. By the terms of the ordinance such mutual and general transfer is required until the expiration of the grant, July 1, 1914.

Claim as to Indeterminate Grants.

Counsel for appellees discuss and combat a claim referred to in the court below as to the legal effect of certain grants from the township of East Cleveland, containing no limit as to the term of grant and made at a time when municipalities had power to make grants without such limitation. We have refrained from discussion of this question for the reason that, having accepted a grant from the City of Cleveland as to the operation of these tracks, as we claim, until 1914, appellant's right to such date must be controlled by the contract with the city, and it would be premature at this time to discuss what the company's legal status as to these tracks will be at the expiration of its present contract with the city. The indeterminate grants referred to were made by the township of East Cleveland, and as to whether or not the city will be

bound to recognize the validity of such grants after the termination of its present operating contract with appellant is a question which we do not think arises upon this record. Cleveland *vs.* Cleveland Electric Ry. Co., *supra.*

Appellant's System of Railway.

Counsel for appellees indulge in much criticism as respects some of the allegations of the bill and claims made in our original brief that the appellant company is operating an entire system of 236 miles of railway, comprising many lines made interdependent through contractual obligations with the city to operate them as an entirety (see map, R., 258), of which these Garden Street tracks form a part, but have long since ceased to be in any sense independent lines. The criticism which is indulged seems rather more rhetorical than argumentative. It is not disputed that prior to the consolidation each constituent company was operated as an independent line; that there was little, if any, exchange of traffic between them by transfer, and that one of the terms and conditions fixed by the council in consenting to the consolidation was to require the operation of the system in such a manner as that upon the payment of one fare a passenger should be carried from any one of the constituent lines to and over any of the other lines. It is manifest that the practical effect of this consolidation of companies, with the conditions fixed by the council, did at once make of the constituent companies one system, as respects the traveling public. This interchange of traffic was required to be and was extended by the ordinance of July 17, 1893 (Rec., 232). It is not disputed but that in 1894, in the establishment of the cross-town line upon Wilson avenue, such provision was made as not only the appellant company, but also what was then an independent company, The Cleveland City Railway Company, were obligated to so operate all of their lines as to enable passengers upon any of the lines of either company to transfer to, from, and across Wilson avenue from any and all

lines coming to or crossing Wilson avenue. The practical effect of these provisions was to make a system united by the Wilson Avenue Cross-town line. The grant so made resulted in making of all the lines in Cleveland one entire system, and conferred upon the traveling public benefits and advantages by way of reduction of fare and convenience of service, and involved on the part of the company the expenditure necessary to build the cross-town line and to acquire the necessary equipment to accommodate the public in the operation of through cars over the entire system. Having received the benefit of these arrangements and expenditures, it ill becomes the City of Cleveland to now make any such question as is sought to be made by the city solicitor, to wit, that it was not the intention of council to bring about the practical situation which has resulted, as set forth in the bill. And, as we have before shown, the attempt here made is to disrupt this system so established under legislative grants, and to deprive the company of the right to continue the operation as respects the Garden Street line, and to deprive the public of the benefit which it has been and is now receiving by reason of the operation contemplated in these various ordinances.

It will not do to say that this sanctioned unification of lines, together with the sanctioned dates of expiration of grants, does not tend to show an intention of the city council and also of the companies to continue and prolong the operation of each of the constituent lines up to a common period of expiration of grants. We say "sanctioned unification." This is criticised. It was sanctioned by approval of the consolidation in 1893. It was sanctioned by the adoption and acceptance of the ordinance of July 17, 1893, whereby all of the conditions of consent to consolidation were reimposed and also new and important obligations were imposed upon each of the constituent companies (Rec., 232, 234). It was sanctioned by the statute authorizing one company to purchase the lines of another, as was done by the appellant later.

It was sanctioned by the recognition of the city council from time to time in legislating in favor of the appellant, not only upon its lines acquired through consolidation, but also its lines obtained through purchase. It has been sanctioned also by years of acquiescence, both of the officials of the city of Cleveland and the traveling public. Above all, this unification was contemplated and sanctioned by the cross-town ordinance, which, as we have so often pointed out, imposed new and additional obligations under sanction and consent of the two independent companies, and the contract involved in the terms of the ordinance.

Inference Deducible Alone from Dates of Expiration, When Considered Together.

More than this. No one can reflect upon the subject alone of *dates of expiration*, as fixed and sanctioned from time to time by the city council, without becoming persuaded of a clear and indisputable intent of the City of Cleveland to change the dates fixed in the late seventies and the early eighties for the expiration of street-railway grants.

We cannot recall a single grant, certainly no grant has been suggested, as to which the council has not since those dates authorized extensions of the tracks embraced within those grants, and at the same time provided for the operation of the new tracks in connection with old ones up to a period later than the dates mentioned in the renewals made in the late seventies and the early eighties. What could have been the purpose of using these later dates? What was the purpose of the council in using the later of two expiring dates in the Woodland Avenue case? This court has answered the question by holding that it meant to provide that the shorter grant should be changed and brought up to a point coincident with the longer one. What could the council have meant when it was using later dates with respect to the expiration of the main line of the East Cleveland Railroad Company? Our learned adversaries make and repeat admissions

that the council intended to extend the grants covering the main line up to July 13, 1913. By the same tokens, we maintain that they are bound logically to concede that when the council fixed the dates employed in its legislation of 1891 respecting the Garden Street extension it intended those grants to continue in point of time until July 13, 1913. The council in express terms so said.

It follows, also, that we must ascribe to the council a like purpose to continue the operation of the Garden Street extension, as well as all the other lines leading to or crossing Wilson avenue, throughout the life of the covenants of the cross-town-ordinance contract. This derives striking support of an evidential character through the legislation of 1895 and 1896, extending the main line of the appellant's predecessor, the East Cleveland Railroad Company, where the council expressly ordained that the grant of the main line should continue until the date fixed for the expiration of the cross-town grant, July 1, 1914.

What possible reason can be suggested for supposing that the council would so provide as to the main line and yet intend that this Garden Street extension of the main line should expire nine years in advance of that date? The only answer vouchsafed to this by either the court below or our adversaries has been that the city council made mistakes and exceeded its powers when it twice said in express terms in 1891 that the grants for the Garden Street branch should be prolonged and continued throughout the life of the grant for the main line. This concedes that the city council *attempted* to avoid a difference in expiration of dates as between the grants for this extension and the main line. This concedes that it *intended* to prolong the extension grant to the date of the main-line grant. Can this court, in view of its former decisions on this subject, be satisfied with this sort of contention of our adversaries?

II.

Questions on the Cross-Appeal.

But two questions are urged by counsel in support of the cross-appeal. Briefly stated, it is in substance contended (1) that the ordinance of January 4, 1904, granting rights to the Forest City Company upon Garden street, was a valid ordinance as a renewal of the prior grant to the East Cleveland Railroad Company and in so far as it provided for the taking over by the Forest City Company of the tracks, poles, wires, etc., of the appellant; (2) that since it was determined by the circuit court that the term for which such tracks were permitted to be used upon Garden street expired March 22, 1905, this property of the company passed to the city as part of the real estate embraced in the street of which it is said the city owns the fee. Of these contentions in their order:

1. THE ORDINANCE OF JULY, 1904, GRANTING A RENEWAL TO THE FOREST CITY RAILWAY COMPANY OF AN EXISTING GRANT TO THE EAST CLEVELAND COMPANY, WAS INVALID, BECAUSE (1) IT UNDERTAKES TO RENEW AN EXISTING GRANT TO A STRANGER TO SUCH GRANT, and (2) IT AUTHORIZES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The contention of our adversaries was well disposed of by Judge Lawrence in the court of common pleas of Cuyahoga county in Reynolds, as tax-payer, etc., *vs.* The City of Cleveland and others, the Judge summing up his discussion by saying:

"This being the view of the Supreme Court concerning the nature of the grant made by municipal corporations, we are bound to hold that a renewal of such grant, like the renewal of a note or of a lease, must be made to and with the opposite party to the contract and not to or with a stranger,

and that the renewal in this case being an attempt to deal with a stranger to the original grant is therefore void."

The opinion from which we have just quoted is found in the Record in this case (Rec., p. 98); and the decree entered in accordance therewith was thereafter affirmed upon appeal to the circuit court, sitting in Cuyahoga county.

The court below in this cause reached the same conclusion, saying in the opinion:

"I am very well satisfied that the ordinance is invalid under which The Forest City Railway Company, defendant herein, undertakes to assert rights in the streets both because a renewal cannot be granted to other than the owner of the original grant, and also because this ordinance seeks to take property without due process of law." (See record in this cause, p. 273.)

In Carter *vs.* Brooklyn Life Insurance Co., 110 N. Y., 15, 22, the court say:

"To renew in its popular sense is to refresh, revive or rehabilitate an expiring or declining subject, but is not to describe the making of a new contract or the creation of a new existence."

See also—
Koday *vs.* Paty, 153 Ind., 179, 184.
White *vs.* Ludlow Mfg. Co., 128 Mass., 280.

It is, we submit, clear that a renewal of an unexpired grant owned by the East Cleveland Railroad Company could not be made to a stranger to the grant. Besides all other reasons, such action amounts to a new and independent grant and would have to be advertised and let to the lowest bidder (secs. 2501 to 2503, Ohio Rev. Stats.). This proposition is, we submit, too clear for argument.

Again, the ordinance of January 11, 1904, attempts to authorize the taking of appellant's property without due process of law. It is entitled:

"An ordinance granting to the Forest City Railway Company, its successors and assigns, the renewal right to maintain and operate certain existing double and single track street railroads in the following streets (Rec., p. 244).

. .

It will be observed that neither in the title nor in the body of the ordinance is there any provision for the construction of a railroad by the Forest City Railway Company, the whole object of the ordinance being to authorize the operation of "certain existing double and single track street railroads."

Section 14 of this ordinance makes it entirely clear that it is intended to confer the right to take over the property of appellant, as in this section is a provision that the grantee shall pay to the owner the value of the tracks, poles, etc., to be reached by agreement, or, upon a failure to agree, to be determined, in some court of competent jurisdiction. Clearly this is an attempt to authorize arbitrarily the taking of possession of the property of the appellant and remit it to an action for damages to recover its value.

We beg to submit as part of our argument an admirable summing up by Judge Lawrence of this feature of the case, in his decision to which we have already referred. The learned judge said:

"The unreasonableness of any other view is well illustrated by the course which the city council took in attempting to grant to a company the franchises for a street railroad under the form of renewing the previous grant to another company. Evidently it was feared that to grant the right to construct a railroad would make a new contract, and the only alternative was to undertake to transfer to a new company the tracks, poles, wires and appliances of the old company now in the street, upon condition of paying the value thereof to the owner, to be agreed upon between the parties, together with twenty per cent. added to such valuation; but if the parties did not agree on or before December 22, 1904, then to pay to the other such sum as should finally be adjudicated by a court of competent jurisdiction

to be the value thereof. * * * This is plainly an attempt to appropriate private property without authority of law and without making compensation in advance, and if carried out would deprive the owner of his property without due process of law. In my opinion the provision to that effect of itself makes the ordinance invalid, for without it the ordinance cannot be operative."

This was as well the opinion of the court below in the case at bar, and we think it unnecessary to add anything to what these judges have said upon that subject.

That the tracks, poles, wires, and appliances in use by the appellant upon Garden street constitute private property, protected by the same guaranty of the Constitution against being taken without due process of law as is the property of an individual, is settled. In Ohio the location as well as the tracks, etc., are held to be private property (H. C. & C. Trac. Co. *vs.* H. & L. Elec. Tran. Co., 69 Ohio St., 402 and 409-412).

See also—

C., B. & Q. R. R. Co. *vs.* Chicago, 166 U. S., 226.
Davidson *vs.* New Orleans, 96 U. S., 87.
Missouri Pacific Ry. Co. *vs.* Nebraska, 164 U. S., 403.
Turnpike Co. *vs.* Parks *et al.*, 50 Ohio St., 598.
Ricker *vs.* Hoyt, 53 Mich., 185.
Ry. Co. *vs.* R. R. Co., 36 Ohio St., 239, at 251, bot.
Street Ry. Co. *vs.* Street Ry. Co., 50 Ohio St., 603, at 615.

If we are right thus far, the ordinance of January 11, 1904, would not entitle the Forest City Company to take possession of appellant's property, even if it were held that the grant to the Garden Street extension expired March 22, 1905. The ordinance would still be open to the objections just mentioned, both as to the attempted renewal to a

stranger and the arbitrary seizure without due process of law.

It is true, as before stated, that counsel urge that the appellant's tracks, poles, wires, etc., are fixtures in the sense that they would become the property of the City of Cleveland upon the expiration of the term of the street-railway grant, and that the city could, as it has here attempted to, transfer its right and title in such property to the Forest City Company. Counsel, in making this claim, frankly admit that it finds no support in any adjudicated case. Plainly such property could not become a fixture, as claimed, in the absence of a showing of an express agreement and intent on the part of the city and the street railway company to treat it as a fixture to be permanently annexed to the realty, so as to transmit the title thereto from the company to the city at the expiration of the grant. It is not claimed that any such showing has been made. If the tracks, poles, wires, etc., could be regarded as at all analogous to a fixture, it would be in the nature of a trade fixture. It is settled that trade fixtures are, in the absence of express agreement to the contrary, to be treated as having been intended to be placed upon the realty only for the time and the object of the possession, and to be removable by the owner at the expiration of the term. The private ownership of tracks and appliances at all times recognized by the courts is inconsistent with the claim here made.

In making the citations and argument aforesaid against the contention of our adversaries, we wish it to be observed that we urge nothing inconsistent with our claim that the court below erred in holding that the grant in question expired March 22, 1905. That error was the foundation for the appeal of the Cleveland Electric Railway Company, and because of such error it asks a reversal of the judgment. Under this decree appellant's rights in the streets are adjudged terminated and the city entitled to remove its tracks.

If the appellant's rights have not expired, it is entitled to enjoin both the Forest City Railway Company and the city from interference.

Respectfully submitted.

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